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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 317

FRIEDRICH FLICK,

Petitioner,

v.

LOUIS A. JOHNSON, *et al.*,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Friedrich Flick, respectfully prays for a rehearing and for the issuance of a writ of certiorari to review the order and judgment of the United States Court of Appeals for the District of Columbia Circuit, dated May 11, 1949, which affirmed an order of the United States District Court for the District of Columbia dismissing his petition for writ of habeas corpus.

Prior Determinations

The District Court ruled that it lacked jurisdiction to entertain the petition on the *sole* ground that petitioner was confined outside the territorial bounds of the District

of Columbia. The Court of Appeals held that the District Court *did have* jurisdiction and then itself determined the controversy upon the merits without remanding the case to the District Court for hearing.

On November 14, 1949, this Honorable Court denied a petition for a writ of certiorari, Mr. Justice Black dissenting and Justices Jackson and Douglas taking no part. *Flick* v. *Johnson et al.*, 70 S. Ct. 158. The Chief Justice of the United States by order dated December 6, 1949, extended the time for filing this petition for rehearing to and including December 27, 1949.

Reasons for Allowance of Writ

The facts are as stated in the original petition. In the brief in support of said petition and the Government's brief in opposition, the question of the character of the tribunal which tried petitioner was discussed. Other important questions not there specifically raised, although available and alluded to by petitioner, are here presented.

I. Regardless of the character of the court which tried petitioner, his detention by officials and agents of the United States is violative of the 5th Amendment of the United States Constitution. Aliens as well as citizens are entitled the protection of the due process clause of the 5th Amendment (*United States* v. *Pink*, 315 U. S. 203). Officials of the United States may not act as "jailors" or "wardens" and hold in confinement persons sentenced by the courts of a foreign jurisdiction—national, international, or military—and at the same time be immune from accountability for their actions. Mr. Justice Douglas, in his opinion in *Hirota* v. *MacArthur*, 338 U. S. 197, at page 204, forcefully expresses the contention of the petitioner. He said:

> "The fact that the tribunal has been set up by the Allied Powers should not of itself preclude our inquiry. Our inquiry is directed not to the conduct of the Allied Powers but to the conduct of our own officials. Our writ would run not to an official of an

Allied Power but to our own official. We would want to know not what authority our Allies had to do what they did but what authority our officials had.

If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation. There is at present no group or confederation to which an official of this Nation owes a higher obligation than he owes to us.

I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well."

To deny judicial inquiry by writ of habeas corpus directed to the American jailor is tantamount to holding that our Government may hold as prisoner any person convicted by the courts of a foreign or international jurisdiction and that the method whereby the conviction was obtained is immaterial. But what if the conviction was obtained by a process of judicial lynching? Or if there was no conviction at all? Has the unfortunate no remedy at law? Would a different rule be applicable in case the victim was an American citizen? Mr. Justice Douglas, in *Hirota* v. *MacArthur, supra*, posed several pointed questions on this subject. He said:

"Let me illustrate the gravity and seriousness of the conclusion of the Court.

(1) Suppose an American citizen collaborated with petitioners in plotting a war against the United States. The laws of the United States provide severe penalties

for such conduct. May that citizen be tried and convicted by an international tribunal and have no access to our courts to challenge the legality of the action of our representatives on it? May he, in the face of the safeguards which our Constitution provides even for traitors, have no protection against American action against him?

(2) Suppose an American citizen on a visit to Japan during the occupation commits murder, embezzlement, or the like. May he be tried by an international tribunal and have no recourse to our courts to challenge its jurisdiction over him?

(3) What about any other civilian so tried and convicted for such a crime committed during the occupation?

These are increasingly important questions as collaboration among nations at the international level continues. They pose questions for which there is no precedent. But we sacrifice principle when we stop our inquiry once we ascertain that the tribunal is international.

I cannot believe that we would adhere to that formula if these petitioners were American citizens. I cannot believe we would adhere to it if this tribunal or some other tribunal were trying American citizens for offenses committed either before or during the occupation. In those cases we would, I feel, look beyond the character of the tribunal to the persons being tried and the offenses with which they were charged. We would ascertain whether, so far as American participation is concerned, there was authority to try the defendants for the precise crimes with which they are charged. That is what we should do here."

The decision of the Court of Appeals for the District of Columbia Circuit and the ruling of this Honorable Court denying the petition filed in this case for a writ of certiorari necessarily requires that the questions propounded by the learned Justice be answered in the negative unless, of course, a different formula is applicable to Americans.

Never before have we considered the propriety of the restraint of liberty on the basis of the nationality of the prisoner. Nor ought we to do so now. It is respectfully contended that a serious and important question is raised involving the power of Americans to hold as prisoners persons condemned by international or foreign tribunals and that review by this Honorable Court is warranted.

II. The denial to the petitioner of an opportunity of presenting evidence, oral and documentary, in support of the petition for writ of habeas corpus is violative of due process and also violative of the express mandate of this Court.

The District Court ruled that it lacked jurisdiction to entertain the petition on the sole ground that the petitioner was confined outside the territorial bounds of the District of Columbia. The District Court also ruled that it would not take any evidence as it was not deciding the controversy on the merits. The Court of Appeals reversed the District Court on the jurisdictional question and decided the case on the merits without remanding to the District Court for hearing. The petitioner was thus deprived of an opportunity of presenting evidence and of a full and fair hearing on controverted issues.

It is elementary that such opportunity must be given to litigants in all proceedings including habeas corpus. (*Price* v. *Johnston,* 334 U. S. 266; *Waley* v. *Johnston,* 316 U. S. 101; *Walker* v. *Johnston,* 312 U. S. 275).

In *Price* v. *Johnston, supra,* at page 291, this Court said, "Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. cf. *Kennedy* v. *Selas Mason Co.,* 334 U. S. 249."

III. Pursuant to Rule 33 of the Revised Rules of this Court, petitioner further contends that there are "intervening circumstances of substantial or controlling effect" which warrant reconsideration of the petition for certiorari heretofore filed.

a) Since the filing of said petition, this Honorable Court granted certiorari in the case of *Eisentrager et al.* v. *Forrestal et al.*, No. 306, October 1949 Term of this Court. Identical questions, involving the jurisdiction of the United States District Court for the District of Columbia to entertain petitions for writs of habeas corpus in cases where petitioners are detained outside the United States and the rights of a non-resident enemy aliens to obtain such writs, were raised in both cases. Until the *Eisentrager* case is determined, the answers to these questions are in doubt (*Aherns* v. *Clark*, 335 U. S. 188). If this Honorable Court reverses the *Eisentrager* case on one or both of the questions presented, it follows that the ruling on the merits in this case was improperly made either because of lack of jurisdiction or because petitioner lacked capacity to sue. But a decision on the merits is recorded and is being regarded as a precedent. Since this Court has presently pending before it the question of the power of the lower courts to even consider such petitions, it is respectfully urged that in the interest of uniformity of decisions that certiorari be granted in this case.

b) Since the filing of the original petition for certiorari, in this case it has come to the attention of counsel that the execution of twenty-nine death sentences was stayed by the Secretary of the Army pending determination thereof. This case is apparently being regarded by the respondent as a test case despite the fact that petitioner herein was never given a hearing on the merits (R. 17, 20; Orig. Petition for Cert., 69-75). Counsel for the petitioner herein do not represent any of the condemned men and have no

interest, directly or indirectly, in their cases. But the death sentence imposed on so large a number of persons, certainly transcends the fate of the petitioner Flick, who was sentenced to seven years' imprisonment.

Determination of Flick's case appears to involve more than his case alone, and involves questions of substance never before passed upon by this Honorable Court. Reconsideration is respectfully prayed for.

c) Since the filing of the original petition for certiorari, the Government admitted for the first time, in its brief in opposition, that the tribunal which tried Flick was an American created Military Court (Govt.'s brief, p. 17), and that it was "unnecessary to characterize that Tribunal as an international tribunal." (Govt.'s brief, p. 20).

Despite their admission that the tribunal was an American creature and that it was not necessary to characterize it as an international tribunal, the respondents assert that it was "not a Tribunal of the United States" (Govt.'s brief, p. 22). It seems that the respondents have taken variant and divergent views on this subject and to the present day are unable to take a position without equivocating.

The failure of this Court to grant the petition for certiorari leaves undetermined the nature and true character of the court which tried petitioner. The judges who sat upon the Court first ruled that it was an American tribunal—national in character. At the end of the trial, adopting the argument of the prosecution, they ruled that it was not an American court but an "international tribunal" (Orig. Petition for Cert., pp. 55-65). In the Court of Appeals, the respondents argued that the tribunal was international because it was applying international law (Orig. Petition for Cert., pp. 65-75). The Court of Appeals abandoned or disregarded that argument and held that the tribunal was "international" because certain language in Control Council Law No. 10 authorized the Zonal Commanders to create international courts. Control Coun-

cil Law No. 10, on its face indicates that no such authorization was given, nor can it be spelled out by inference (Orig. Petition for Cert., pp. 70-75). It was only after the original petition for certiorari was filed that the respondents abandoned their earlier contention and argued that it was not necessary to characterize the tribunal which tried petitioner as an "international tribunal" (Govt.'s brief, pp. 20, 22). If the tribunal was not an international court and not a U. S. military tribunal, then may we ask what was it? Many scholars and learned authorities on international law have determined that the tribunal was not an international court. Presently even the Government does not claim that it was. The petitioner has always contended that it was a U. S. military tribunal, although allegedly applying international law. In view of the fact that it is not longer contended that Tribunal IV which tried petitioner was international, the *Hirota* case on which the Court of Appeals relied can not be considered as an authority, since that case involved a trial before an international tribunal.

The questions raised in the original petition for certiorari and on this petition for rehearing are, as Mr. Justice Douglas pointed out in *Hirota* v. *MacArthur, supra*, of a grave and serious nature involving federal questions of substance not heretofore determined by this Honorable Court and which warrant this court's consideration.

Prayer for Relief

For the reasons hereinabove stated and for those stated in the original petition for a writ of certiorari and the brief submitted in support thereof, it is respectfully prayed that a rehearing be granted and that upon such rehearing the order dated 14 November 1949 denying certiorari be vacated, and that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit, and that petitioner be granted such other further and equitable relief as this court may deem just and proper.

Counsel certify that this petition for rehearing is presented in good faith and not for delay, and that it is confined to substantial grounds available to petitioner although not previously presented, and to intervening circumstances of substantial or controlling effect.

Respectfully submitted,

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